IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number 89-10818
TRIANGLE FORD-MERCURY, INC.	)	
	)	
Debtor	)	
	)	
A. STEPHENSON WALLACE,	)	FILED
Trustee of the Estate of	)	at 3 O'clock & 04 min. P.M.
TRIANGLE FORD-MERCURY, INC.	)	Date: 9-12-91
	)	
Movant	)	
	)	
vs.	)	
	)	
FIRST UNION NATIONAL BANK	)	
	)	
Respondent	)	

ORDER

A. Stephenson Wallace, Chapter 7 trustee in this case, objects to the claim of First Union National Bank ("First Union"). Based on the submitted briefs, evidence adduced at hearing and relevant authorities, I make the following findings of fact and conclusions of law overruling the objection.

FINDINGS OF FACT

Debtor, Triangle Ford-Mercury, Inc., was a car dealership located in Waynesboro, Georgia. Debtor's ownership is divided as follows: James R. Hays, Jr. a 33% shareholder; Richard G. Flynt, Sr. a 34% shareholder; and Richard G. Flynt, Jr. a 33% shareholder. Each shareholder was also an officer/director of the debtor. Mr. Hays was the president. Mr. Flynt, Sr. was the vice president. Mr. Flynt, Jr. was the secretary. Mr. Hays was also the general manager in charge of the day-to-day operations of debtor's business. As president and general manager, Mr. Hays exercised complete and exclusive control over the daily operation of the business. He had power to buy and sell equipment and inventory on behalf of the debtor; to accept payment on behalf of the debtor in connection with such transactions; to assign the debtor's retail installment sale contracts; and to make all other necessary decisions involved in running the debtor's business.

Debtor's three directors executed a corporate resolution entitled "Certificate of Authority for Corporate Borrowing and Other Transactions with Georgia Railroad Bank & Trust Company" (the "corporate resolution").[1] The second numbered section of the corporate resolution provides,

> That _____ is/are hereby authorized for, on behalf of, and in the name of the corporation to: . . . Borrow money, directly

[1]First Union is the successor to Georgia Railroad Bank and Trust Co.

> or indirectly, with or without security . . .

No one is named in the original document. The corporate resolution provides in section 3, paragraph 3,

> the following are officers of said corporation, duly elected, qualified and now acting as such and/or designated employees may assign retail installment contracts on behalf of said corporation . . . .

Below appear the typewritten names and corresponding signatures of Mr. Hays, Mr. Flynt, Sr. and Mr. Flynt, Jr. The signature of the secretary, Mr. Flynt, Jr., appears again at the very bottom of the document; however, the corporate seal is missing.

The debtor's business was selling cars. Debtor sold cars and entered into retail installment sale contracts with purchasers. First Union purchased the retail installment sale contracts from the debtor. At all times Mr. Hays acted on behalf of debtor in assigning the contracts to First Union. First Union kept on file a copy of debtor's corporate resolution under which Mr. Hays assigned the contracts. First Union issued checks payable to the debtor in exchange for the contracts. Mr. Hays was authorized to endorse the checks on behalf of the debtor.

On October 1, 1988, Mr. Hays, purporting to act on behalf of the debtor, transferred two (2) Ford vans from the debtor's inventory. In the transaction the debtor, through Mr. Hays,

purported to act as buyer and seller. Mr. Hays executed two (2) retail installment sale contracts in connection with the transfer. Each contract listed debtor as buyer and seller. Although this type

of transaction is not an everyday occurrence among car dealerships, unrebutted testimony established that this is a typical way for a dealer to remove vehicles from a floor plan financing arrangement in order to rent, lease, or use a vehicle in the business. Debtor's directors did not hold a corporate meeting to authorize Mr. Hays to enter the transaction.

The amount financed on each contract was Nineteen Thousand Seventy-One and 60/100 ($19,071.60) Dollars. First Union purchased the two (2) contracts from the debtor, through Mr. Hays, for Thirty Eight Thousand Eighty-Three and 20/100 ($38,083.20) Dollars, the amount of the two (2) contracts less certain administrative fees, and issued a check payable to debtor. The debtor's accounting records indicate that the debtor never received the proceeds of First Union's check.[2] Under each of the contracts the debtor made four (4) installment payments to First Union. As a part of the assignment of the retail installment sale contract on each van, the debtor, as assignor, was to take the necessary steps to procure a certificate of title on each van

[2]It appears, based on testimony that Mr. Hays absconded with the proceeds.

listing First Union as the first in priority lienholder thus perfecting First Union's lien. The debtor failed to take any steps to perfect the lien of First Union and later sold the vans from its inventory to third parties.

Debtor filed for relief under chapter 7 of title 11 U.S. Code on June 2, 1989. First Union timely filed a proof of claim as an unsecured creditor in the amount of Thirty-Six Thousand Nine Hundred Sixty-Eight and 88/100 ($36,968.88) Dollars, which reflects the outstanding debt on the two contracts. The Chapter 7 trustee, A. Stephenson Wallace, objects to the claim.

CONCLUSIONS OF LAW

In support of his objection, the trustee contends the debtor is not bound to the contracts on which First Union's proof of claim is premised because Mr. Hays lacked authority to enter into the contracts on debtor's behalf. Once a claim is filed it is presumed valid and is prima facie evidence of the validity of both the claim and amount. See In re: Securities Groups, 116 B.R. 839, 845 (Bankr. M.D. Fla. 1990). "A claim or interest, proof of which is filed under section 501 of this title [11], is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. §502(a). Normally in a hearing on a properly filed objection to claim the burden is initially on the objecting party

to put forth sufficient evidence to overcome the prima facie correctness of the claim. Securities Groups, supra. Once the objecting party comes forth with sufficient evidence to place the claim's allowability as filed at issue the burden of going forward with evidence to sustain the claim shifts to the claimant. In re: Cherry, 116 B.R. 315, 316 (Bankr. M.D. Ga. 1990). The ultimate burden of persuasion rests with the

claimant. See id. Further, in a dispute, as here, over the authority of an agent to borrow on behalf of the principal, the burden is on the lender to show the contract obligates the principal as borrower under state law. D.A.D.. Inc. v. C & S Bank of Tucker, 227 Ga. 111, 179 S.E.2d 71 (1971).

At issue is the extent of the agent's authority under Georgia law to act on behalf of the principal. In determining whether to allow First Union's proof of claim I must determine whether Mr. Hays had authority to transfer two (2) vehicles on behalf of the debtor from the debtor's inventory, execute two retail installment sale contracts in connection with the transaction, and assign the contracts to First Union. If under Georgia law Mr. Hays had authority, express or implied, to enter into this transaction on behalf of the debtor, the debtor is bound to the terms of the two contracts. If Mr. Hays lacked authority, the debtor is not bound. First Union's proof of claim is valid

only if the debtor is bound to the contracts. If liability is established, the amount of the claim is not at issue.

The evidence established and the trustee concedes that Mr. Hays possessed the authority to assign retail installment sale contracts between the debtor and its customers to First Union. Section 3 of the corporate resolution, paragraph 3, supra expressly provides that Mr. Hays was authorized to assign such contracts. The trustee argues, however, that the transfer of the

two contracts in the manner described above was an assignment "only in passing." The trustee contends the transaction effectively constitutes a loan. It is Mr. Hays' authority to borrow money on behalf of the debtor that the trustee disputes. The trustee having established a prima facie case that First Union's proof of claim is invalid, First Union bears the burden of proof that its claim is allowable. Cherry, supra.

The threshold question in determining whether the debtor is bound to the contracts is whether the transaction at issue constitutes a loan. There is no dispute regarding Mr. Hays' authority pursuant to the corporate resolution to assign the debtor's retail installment sale contracts. If, therefore, this transaction was just another assignment of retail installment sale contracts, the debtor is bound. If the transaction constitutes a loan, the debtor is only bound if Mr. Hays had authority, express or implied, to "borrow" on behalf of

the debtor in this manner.

The net effect of the transaction was that the debtor retained its vehicles and obtained money. The debtor is obligated under the contracts to repay First Union. In all respects the effect of the transaction on the rights of the parties was the same as if the debtor had simply executed a note in favor of First Union on a loan. The debtor was to take full responsibility for the contracts and deliver certificate of title to First Union as lienholder. I find the transaction constitutes a "loan" from First
Union to the debtor for purposes of determining whether Mr. Hays had authority to bind the debtor. First Union, therefore, must establish that Mr. Hays had either actual or implied authority to bind debtor in this loan.

First Union advances three (3) arguments in support of its contention that the two (2) retail installment sale contracts are binding on the debtor even if the transaction is construed as a loan. First Union contends Mr. Hays had actual authority to enter this transaction by virtue of the corporate resolution. First Union argues that by leaving blank the line provided for those individuals authorized to borrow in section 2 of the corporate resolution, supra, the debtor gave First Union the right to insert any one of the names whose signatures appear at the bottom of the document. Second, First Union contends Mr. Hays had apparent authority by virtue of a prior course of dealings

between the parties. Finally, First Union argues that debtor ratified the contracts by making four installment payments on each contract and remaining silent as to the nature of the transaction.

Mr. Hays' office as president is not in and of itself enough to vest him with actual authority to borrower on behalf of the debtor. Western American Life Ins. Co. v. Hicks, 217 S.E.2d 323 (Ga. App. 1975).

> [T]he president of a corporation has no general power or authority to bind a corporation for a loan obtained by him for his own purposes by signing the corporation's name to a note, the
>
> corporation receiving no benefit therefrom, nor ratifying the same in any way . . . .

D.A.D.. Inc., supra, 179 S.E.2d at 73-74. O.C.G.A. §14-5-5[3] provided in pertinent part:

> No director or officer of any corporation shall use or borrow for himself directly or indirectly any money or other property belonging to any corporation of which he is a director or officer without the permission of a majority of the board of directors or of a majority of a committee of the board authorized to act for the board.

The purpose of section 2 of the corporate resolution was to delineate individuals authorized to borrow on behalf of the debtor; however, no name appears in the blank provided for authorized individuals. First Union's argument that the

---

[3]O.C.G.A. §14-5-5 was repealed effective July 1, 1989. The transaction at issue took place on October 1, 1988

directors' "failure" to fill in the blank permitted First Union to fill in the name of any one of the three signatories is unpersuasive. First Union cites Kiker v. Broadwell, 30 Ga. App. 466 (1923) and Van Norden v. Auto Credit Co., 109 Ga. App. 209 (1964) in support of its argument that leaving the line blank "legally authorized [First Union] to consider James R. Hays, Jr. a proper individual to incur a debt on behalf of the corporation." Those cases, however, are inapplicable here as each of the cited cases involved an exchange of contracts, not a corporate resolution with a blank line

provision. In Kiker and Van Norden, the parties to the contracts disputed the meaning of leaving the lines blank. The respective courts held that where parties exchange contracts with a line left blank and evidently intended the recipient to complete the document, the receiver has implied authority to fill in the blank. Kiker, Van Norden, supra. Here, however, it is a corporate resolution not a contract between the debtor and First Union, which leaves a line blank. There was no exchange of documents for completion. There is nothing whatsoever to indicate that by leaving blank the line in section 2 of the corporate resolution, the directors intended that First Union, or anyone, could fill in a name and thereby authorize that person to borrow on debtor's

behalf. The rationale of Kiker and Van Norden does not apply to these facts. I find the corporate resolution did not grant Mr. Hays actual authority to borrow for the debtor.

However, as First Union correctly argues, the corporate resolution was not the exclusive means of authorizing Mr. Hays to borrow on behalf of the debtor. See e.g., Eli & Walker. Div. First Nat. v. Dux-Mixture Hardware, 732 F.2d 821 (11th Cir. 1984); Rossville Bank v. Southeast Fed. Sav. Bk., 385 S.E.2d 9 (Ga. App. 1989). In Eli & Walker, supra, the corporate defendant sought to relieve itself of a contractual obligation by arguing that the defendant's president, who authorized the transaction, lacked authority to bind the defendant. Although there had been no express

grant of authority to the defendant's president, the defendant's board of directors vested the president through a long course of conduct with authority to do as he pleased with the business. The evidence established that the directors "acquiesced in [the president's] operation of the business as if it were his sole proprietorship." Id. at 826. The Eleventh Circuit Court of Appeals adopted the district court's findings, 582 F.Supp. 285 (N.D. Ga. 1982), wherein the district court held that where a prior course of dealing shows a corporate president had the general authority to do as he pleased, the corporation cannot,

under Georgia law, assert as a defense to the lender's action on the contract the president's lack of authority. Id. at 826-27. In Rossville Bank, supra, the president, who was also a two-thirds owner of the corporate debtor, obtained certain loans from several banks acting on behalf of the debtor. In a lawsuit that ensued between two of the banks over one bank's offset of collateral against a loan, the plaintiff bank asserted that without a corporate resolution, the corporate president lacked authority to borrow for the corporation and pledge the corporation's assets. The Georgia Court of Appeals held:

> While it is usually preferred to have the board's authorizations reflected formally in a corporate resolution "that method is not the exclusive one for establishing the existence either of authority or of inherent agency power" to make loans and pledge corporate assets therefor. Thus, for example, a director's or officer's authority to act for the corporation
>
> also can be established by a course of dealings or usage in which the directors or stockholders have acquiesced.

Id. at 11 (citation omitted) [quoting Trust Co. of Ga. v. Nationwide Mov. & Stor. Co., 235 Ga. 229, 219 S.E.2d 162, 166 (1975)] Accord Peoples Bank of LaGrange v. Georgia Bank & Trust Co., 191 S.E.2d 876 (Ga. App. 1972).

> The authority of an agent in a particular instance need not be proved by an express contract; it may be established by the principal's conduct and course of dealing, and if one holds out another as his agent, and by his course of dealing indicates

> the agent has certain authority, and thus induces another to deal with his agent as such, he is estopped to deny that the agent has any authority which, as reasonably deducible from the conduct of the parties, the agent apparently has.

20/20 Vision Center. Inc. v. Hudgens, 256 Ga. 129, 345 S.E.2d 330, 334 (1986) [quoting Atlanta Biltmore Hotel Corp. v. Martell, 162 S.E.2d 815, 817 (1968) (citations omitted)]. "There is a caveat to this rule, however, for its protection extends only to 'third persons who have in good faith and in reasonable prudence dealt with the apparent agent on the faith of the relation."' Peoples Bank of LaGrange, supra, at 879 [quoting Folsom v. Miller, 116 S.E.2d 1, 3 (Ga. App. 1960)]; See also, 20/20 Vision Center, supra, at 334. The burden is on First Union to show reasonable prudence in making the "loan" to the debtor. Peoples Bank of LaGrange, supra, at 879. The test is whether a person of reasonable prudence would make further inquiry as to the agent's authority before lending the money. Id.

Did Mr. Hays have apparent authority to enter into the transaction on behalf of the debtor? Yes. By a long course of conduct, Mr. Flynt, Sr. and Mr. Flynt, Jr. acquiesced in Mr. Hays' complete control over the debtor's business and vested Mr. Hays with his expansive authority to run the business. Mr. Hays had exclusive control over the management and day-to-day

operation of the business. This authority included express authority to assign debtor's retail installment sale contracts to First Union. Unrebutted testimony at trial established that First Union's officers had no reason to suspect that Mr. Hays lacked authority to execute the retail installment sale contracts in question and assign them to First Union. First Union kept on file the corporate resolution of each dealership with which it did business. The evidence showed that First Union does not customarily require an additional corporate resolution to authorize a transaction once one has been filed. Thus, to First Union, the corporate resolution on file for the debtor was sufficient to show, as to form, that Mr. Hays had authority to assign the contracts in question. Moreover, testimony revealed that First Union has purchased retail contracts in similar transactions with other dealers that wanted, as a matter of convenience, to remove vehicles from their floor plan for use in the business. In short, to First Union there was nothing wrong with or unusual about this transaction. For all appearances this

transaction was part of the day-to-day operations of the debtor's business that through a course of dealings was left to Mr. Hays. There was nothing to indicate Mr. Hays did not have the authority to act on behalf of the debtor in this manner. Accordingly, I find First Union has satisfied its burden of proof that it acted

with reasonable prudence in accepting the assignment of the two retail installment sale contracts. Mr. Hays had apparent authority to bind the debtor in the transaction. First Union's claim against the debtor on the two contracts having been established as valid, the issue of ratification is not addressed.

It is therefore ORDERED that the trustee's objection to claim is overruled. First Union's proof of claim in the amount of Thirty-Six Thousand Nine Hundred Sixty-Eight and 88/100 ($36,968.88) Dollars is allowed as an unsecured claim.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 12th day of September, 1991.